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No. 84-1506

In the

Supreme Court of the United States

October Term, 1984

AIRWORK SERVICE DIVISION,

Petitioner,

vs.

DIRECTOR, DIVISION OF TAXATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY IN SUPPORT OF THE PETITIONER

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

The American Civil Liberties Union of New Jersey ("ACLU of New Jersey"), respectfully moves this Court for leave to file the accompanying brief in this case as *amicus curiae.* The written consent of the attorney for the petitioner herein has been obtained, but the attorney for the respondent herein has refused to consent to the filing of a brief by the ACLU of New Jersey as *amicus curiae.*

The interest of the ACLU of New Jersey is discussed in the accompanying brief. The brief of the petitioner herein

in the New Jersey Supreme Court and its petition for a writ of certiorari do not adequately address the federal constitutional substantive due process issue that is of primary concern to the ACLU of New Jersey. The ACLU of New Jersey does not believe that the argument on this point will be expanded and be made complete in this Court unless leave is granted to the ACLU of New Jersey to participate. If the ACLU of New Jersey's argument is accepted by this Court, the decision of the New Jersey Supreme Court must be reversed.

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BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY IN SUPPORT OF A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of New Jersey ("ACLU of New Jersey") participated below before the New Jersey Supreme Court as an *amicus curiae,* having obtained leave of that court to do so. Although the four member majority purported not to pass on the merits of the ACLU of New Jersey's position, *Airwork Service Division v. Director, Division of Taxation,* 97 N.J. 290, 302, 478 A.2d 729 (1984), the vigorous dissent of Justice Garibaldi, joined by two other members of the court, relied heavily on the position espoused by the ACLU of New Jersey and by the other *amicus curiae,* Consumer Bureau. 97 N.J. at 302-303, 310-312. For the same reasons that prompted the ACLU of New Jersey to participate as an *amicus curiae* below, it urges this Court to grant Airwork's petition for a writ of certiorari.

The ACLU of New Jersey has a special interest and expertise with respect to the constitutional issues which the petition for a writ of certiorari requests this Court to address. The American Civil Liberties Union, of which the ACLU of New Jersey is an affiliate, is an organization founded over sixty years ago and dedicated to the protection of the liberties guaranteed by the United States Constitution. One of the central, though sometimes elusive, liberties is that embodied in the concepts of procedural and substantive due process. In its most fundamental sense, due process provides a crucial check on the power of the government over the interests and rights of its citizens. Government must, consistent with the precepts of substantive due process, deal with its citizens in a fundamentally fair manner. The right to fundamental fairness applies with equal force to all citizens, whether students, the poor, minorities, or corporate

entities. The ACLU of New Jersey is not particularly concerned with the economic interests of Airwork. It is, however, vitally concerned that the harsh, unjust and fundamentally unfair manner in which the New Jersey taxing authorities have dealt with Airwork, now with the approval of New Jersey's highest court, sets a dangerous precedent that threatens the rights of all citizens.

REASONS FOR GRANTING THE WRIT

The petition of Airwork adequately presents the facts and the proceedings below. Simply stated, Airwork, in reliance on a 1966 Official News Release of the Sales Tax Bureau of the New Jersey Division of Taxation and on July and August 1967 audits of its books and records, did not collect the New Jersey sales tax on repair services it performed on aircraft engines for out-of-state customers where delivery of the serviced engines was made outside New Jersey. *See* 97 N.J. at 304-305 (Garibaldi, J., dissenting). In 1973, despite the position set forth in the 1966 News Release, the Division assessed Airwork back to August 1971[1] for sales taxes on engines delivered out-of-state which Airwork had not collected from its customers. The issue raised by the facts below can be succinctly framed: In light of the nature of the New Jersey sales tax, the prior positions taken by the state taxing authorities, and Airwork's understandable reliance on those positions, does the imposition on Airwork of primary

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1. The Division chose August, 1971, because that was the date of the Division of Tax Appeals' unreported decision in *Fisher-Stevens, Inc. v. Director, Division of Taxation*, Docket S.T. 109 (1971), aff'd, 121 N.J. Super. 513 (App. Div. 1972), certif. denied, 62 N.J. 575 (1973). As Justice Garibaldi observed in her dissent, the *Fisher-Stevens* decision did not even come close to addressing the application of the sales tax to the services at issue in this case, nor should Airwork have been expected to be aware of the unreported agency decision. 97 N.J. at 307-308 (Garibaldi, J., dissenting).

liability for taxes it can no longer collect from its customers[2] produce a result so harsh and unfair as to violate substantive due process. As the vigorous dissent below concluded, "the retroactive imposition of the sales tax [on Airwork] produces such a harsh result that it offends fundamental concepts of fairness relating to agency conduct." 97 N.J. at 303 (Garibaldi, J., dissenting). The ACLU of New Jersey urges this Court to issue a writ of certiorari to review this question.

Constitutional due process imposes certain limits on the retroactive application of taxing schemes. As stated in *Welch v. Henry*, 305 U.S. 134, 147 (1938):

> In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation.

In the instant case it was not Congress or a state legislature that chose to enact a retroactive tax measure. Rather, the state taxing agency, under the guise of correcting its earlier announced position, effectively applied the sales tax in a retroac-

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2. In none of the lower courts' decisions is it suggested that Airwork could seek to recover the sales tax from the customers from which it did not collect the tax. In fact, in her dissenting opinion, Justice Garibaldi made note of "Airwork's current inability to collect the sales taxes. . ." from its prior customers. 97 N.J. at 303. In relevant part, the sales tax statute requires that the vendor collect the tax from the customer "when collecting the price [or] service charge. . . to which it applies." N.J. Stat. Ann. §54:32B-12(a) (West 1984 Supp.). Although N.J. Stat. Ann. §54:32B-14(a) (West 1984 Supp.) appears to confer upon the vendor the ability to sue a customer for unpaid taxes as though they were part of the purchase price, the statute is unclear how that right is affected if the purchase price has already been collected. Even if Airwork could, theoretically, sue each of its prior customers, the burden of doing so would have been unfairly imposed by the Division's retroactive application of the sales tax to Airwork's repair services on out-of-state engines.

tive manner so as to force Airwork, as a "tax collector" to pay the tax it could no longer collect from its customers.[3]

That this retroactive application is so fundamentally unfair as to violate due process becomes evident upon an examination of the harsh and oppressive results under the taxing scheme at issue. The New Jersey sales tax is premised on the notion that a portion of the cost of government should be borne by the retail purchasers of certain goods and services. Consistent with that premise, the tax is imposed on the customer, not on the vendor. N.J. Stat. Ann. §54:32B-12 (West 1984 Supp.). Secondary liability is imposed on the vendor, N.J. Stat. Ann. §54:32B-14 (West 1984 Supp.), but simply as an inducement to properly collect and turn over to the state the sales tax.[4] The effect of the Division of Taxation's retroactive application of its announced change in policy was to allow the consumer to escape the tax, while imposing it instead on Airwork, the vendor. As such, retroactive application changed the very nature of the tax from a sales tax to be paid by the customer to a business tax to be paid by the vendor for the privilege of selling retail goods and services. The vendor in Airwork's position could

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3. Where Congress or a state legislature would be prevented by principles of due process from applying a tax retroactively, surely a state agency cannot, under the argument that it is immune from principles of estoppel, achieve that very result by changing its prior position. Even less deference should be accorded an agency's retroactive decisions than might be given to a legislature's objectives in imposing retroactivity. *See* Berger, *Retroactive Administrative Decisions*, 115 U. Pa. L. Rev. 371, 375 (1967).

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4. That the customer is the target of the tax and the vendor the collecting agent is demonstrated throughout the statute. *See, e.g.*, N.J. Stat. Ann. §54:32B-2(w) (West 1984 Supp.) (vendors are "persons required to collect the tax"); N.J. Stat. Ann. §54:32B-12(a) (West 1984 Supp.) (vendors are to "collect the tax from the customer," the "tax shall be paid [by the customer] to the [vendor] as trustee for and on account of the State"); N.J. Stat. Ann. §54:32B-20(a)(West 1984 Supp.) (vendor may obtain a refund from the state only if he demonstrates that he has refunded the tax to the customer).

no longer collect the tax from the customer because the Division's retroactive application *first* imposed the tax on Airwork's out-of-state transactions *after* those transactions had occurred.

The transformation of Airwork from the role of a tax collector to that of a primary taxpayer could easily have been avoided had the taxing authority provided adequate notice of its new position. This fact underscores the unfairness inherent in the Division's actions in this case. By upholding the Division's actions, the New Jersey Supreme Court has essentially ruled that an agency of government is free to change its official, published policy and apply that change retroactively, even though affected citizens will suffer irreparable detriment by having relied on the agency's original instructions, and even though such harm could have been avoided merely by the agency having given adequate notice.

What distinguishes this case from cases like *Welch, supra,* 305 U.S. 134, and what renders retroactive application of the sales tax so fundamentally unfair is the otherwise secondary nature of the vendor's liability. The question of retroactive application of taxes so as to transform secondary liability into primary liability arises most often, if not exclusively, in connection with policy changes of a taxing agency, as in the instant case. The majority and the concurring opinions in *Central Illinois Public Service Co. v. United States,* 435 U.S. 21 (1978), addressed this very problem. In *Central Illinois Public Service,* the Internal Revenue Service had attempted to assess retroactively an employer who failed to withhold taxes from those portions of its employees' wages which represented reimbursement for meals. This Court, in its majority opinion, concluded that the regulation was beyond the scope of the tax statute. 435 U.S. at 31-33. Thus, it did not have to reach the question of whether retroactive application of the regulation would be so unfair as to constitute an abuse of discretion or a violation of due proc-

ess. Nevertheless, the Court was clearly concerned that persons who would normally only be *secondarily* liable under the taxing scheme, would, through retroactive rulings, become *primarily* liable for what should have been someone else's taxes. After noting that the regulations extant during the relevant period could hardly be considered to have put employers on notice of their potential liability, the Court concluded:

> An imposition of withholding responsibility on the Company for the lunch reimbursements as far back as 1963 strikes us as somewhat retroactive in character and almost punitive in light of the facts of this case. [435 U.S. at 33, n. 12]

Justice Brennan, joined by the Chief Justice Burger and Justice Powell, wrote a concurring opinion "to state more fully my views on why petitioner cannot be subjected *retroactively* to withholding tax on the theory — whether correct or not — espoused here by the Government." 435 U.S. at 33 (emphasis in original). Justice Brennan went on to observe:

> Those who administer the Internal Revenue Code unquestionably have broad authority to make tax rulings and regulations retroactive. . . . That authority is not unfettered, however, and conditions are present here that would make retroactive application of the withholding tax to petitioner's lunch payment an abuse of discretion. [435 U.S. at 33-34 (citations omitted)]

In the instant case, the Division of Taxation's retroactive application of its changed position so far exceeded the proper exercise of discretion as to constitute a violation of fundamental fairness.

Several state courts have recognized the harshness and oppression that result when a taxing agency retroactively applies policy changes under taxing schemes intended to impose only

secondary liability on the collecting agent. *See Peoria Hotel Co. v. Illinois Dept. of Revenue,* 408 N.E. 2d 1182, 87 Ill. App. 3d 176, 42 Ill. Dec. 473 (App. Ct. 1980); *Pressed Steel Car Co. v. Lyons,* 7 Ill. 2d 95, 129 N.E. 2d 765 (1955); *Hercules Powder Co. v. State Bd. of Equalization,* 66 Wyo. 263, 208 P.2d 1096, rehearing, 66 Wyo. 309, 210 P.2d 824 (1948); *La Societe Française de Bienfaisance Mutuelle v. California Employment Commission,* 56 Cal. App. 2d 534, 133 P.2d 47 (Ct. App. 1943). Although sometimes subsumed under the concepts of abuse of discretion or estoppel, the ACLU of New Jersey submits that these cases, as does the instant case, implicate the substantive due process principle that the government cannot deal with its citizens in a manner that is fundamentally unfair.

JURISDICTION

As noted in Airwork's petition, the majority of the New Jersey Supreme Court never explicitly addressed the issue of retroactivity in terms of constitutional due process. Petition at 12 n.8. *See* 97 N.J. at 302. Despite that fact, this Court can and should determine that it has jurisdiction under 28 U.S.C. §1257(3) to issue a writ of certiorari.

In this case, the first requirement of the "pressed and passed upon" test of jurisdiction has clearly been satisfied. *See, e.g., Webb v. Webb,* 451 U.S. 493 (1981). The federal constitutional question upon which the ACLU of New Jersey urges this Court to issue the writ was adequately and fully presented in the state courts. As the New Jersey Supreme Court specifically noted, "*Amicus* American Civil Liberties Union of New Jersey argues that the retroactive imposition of the sales tax violates plaintiff's constitutional right to substantive due process under both federal and State constitutions." 97 N.J. at 302, n.1. Having

recognized that the federal constitutional issues had been raised before it, the majority purported not to address those issues for the following reasons:

> These issues were not determined by the courts below. We note these issues, but in the absence of their consideration by the lower courts, and without a sound and complete record to demonstrate their validity, decline to address them. [97 N.J. at 302]

The jurisdictional question posed by the New Jersey Supreme Court's characterization of its basis for not reaching the constitutional due process issue is that addressed by this Court in cases such as *Hathorn v. Lovorn*, 457 U.S. 255, rehearing denied, 458 U.S. 1131 (1982), *Michigan v. Tyler*, 436 U.S. 499 (1978), and *Wainwright v. Sykes*, 433 U.S. 72, rehearing denied, 434 U.S. 880 (1977). As stated in *Hathorn*, 457 U.S. at 262, a state court ruling that a federal issue will not be considered because it was not raised in a manner that complies with state court's procedural rules *may* constitute an independent and adequate state ground barring this Court's review.

That the purported failure to comply with a procedural rule may defeat jurisdiction does not mean that it necessarily will. As reiterated in *Michigan v. Long*, 103 S. Ct. 3469, 3474, ____ U.S. ____ (1983), it is incumbent upon this Court to ascertain for itself whether the asserted non-federal ground independently and adequately supports the state court judgment. Accordingly, it is appropriate for this Court to examine the New Jersey Supreme Court's announced rationale for not passing on the constitutional issue. In particular, in examining the New Jersey court's action, this Court should be mindful that an alleged procedural defect in failing to raise a federal constitutional question will not be considered an adequate state ground unless the procedural rule "is strictly or regularly followed." *Barr v. City of Columbia*, 378 U.S. 146 (1964). *See Hathorn, supra*, 457 U.S. 255. The ACLU of New Jersey respectfully submits

that the procedural rule upon which the New Jersey Supreme Court apparently relied does not meet this standard.

A serious obstacle to evaluating the New Jersey court's decision against the "strictly or regularly followed" standard is that the court failed to identify with any particularity the procedural rule or precedent upon which it was relying when it refused to address the substantive due process issue. Presumably, the New Jersey Supreme Court was alluding to the "not raised below" rule, stated in *Deerfield Estates, Inc. v. Township of East Brunswick,* 60 N.J 115, 120, 286 A.2d 498 (1972):

> [T]he general rule of appellate practice, that ordinarily no issue will be considered by the reviewing court unless raised and argued below, is true of a constitutional issue, unless it goes to the question of jurisdiction or presents a matter of real public importance. Where both these characteristics are lacking, review will normally be denied.

Not only has the New Jersey Supreme Court not "strictly or regularly followed" this alleged procedural rule, the rule's formulation has almost as many variations as the cases in which it is cited. More often than not, those formulations include additional factors which would dictate addressing the constitutional issue in this case. Four examples will demonstrate the inadequacies of the New Jersey courts' formulation and application of the "not raised below" rule.

The manner in which the rule was applied in *The Presbyterian Home v. Division of Tax Appeals,* 55 N.J. 275, 288, 261 A.2d 143 (1970) is particularly disturbing. The petitioner in that case asserted an equal protection issue before the New Jersey Supreme Court. After first noting that the petitioner had not raised this constitutional issue in either the Division of Tax Appeals or the Appellate Division, the court stated that it "may, but need not, accept a constitutional question not raised" be-

low. 55 N.J. at 289. Having stated what can hardly be described as a "strict" rule, the court concluded, "In any event, we find no merit in petitioner's claim." 55 N.J. at 289. Despite never even suggesting that the claim was of public importance, the court addressed the merits of the issue, finding it to have no merit. Surely the jurisdiction of this Court cannot rise or fall on a supposed procedural rule under which the New Jersey Supreme Court will exercise its discretion in favor of considering an "untimely" constitutional issue only when the issue has no merit.

A strikingly different variation of the "not raised below" rule was announced in *Krieger v. Jersey City*, 27 N.J. 535, 544, 143 A.2d 564 (1958):

> We have heretofore expressed our willingness to accept issues first advanced on appeal where the expenditure of public funds is involved. *Howard v. Mayor and Board of Finance of City of Paterson*, 6 N.J. 373, 376 (1951).

The instant case involves a significant amount of public funds — over $600,000 in sales taxes allegedly due from Airwork. The fact that considering a constitutional issue may result in a loss of public funds rather than, as in *Howard v. Mayor and Board of Finance of City of Paterson*, 6 N.J. 373, 78 A.2d 709 (1951), a conservation of such funds, should not provide the basis for refusing to consider the issue.

In *In re appeal of Howard D. Johnson Co.*, 36 N.J. 433, 177 A.2d 545 (1962), Justice Weintraub, in dealing with a non-constitutional issue not raised below, stated that the New Jersey courts embrace "the philosophy that justice is the common burden of both counsel and the court and hence a manifestly unjust result shall not be ordered because of the oversight of the advocate." In entertaining the issue in that case, the court never even suggested that the issue was one of significant pub-

lic importance. 36 N.J. at 443. The oversight of Airwork's counsel in not raising the constitutional issues before the lower courts — issues of significant public importance — would not have resulted in the New Jersey Supreme Court refusing to address the issues, had the court applied the rule as formulated in *Howard D. Johnson Co.*

A final example of where the New Jersey Supreme Court relaxed its "not argued below" rule is provided by *Kelley v. Curtiss,* 16 N.J. 265, 108 A.2d 431 (1954). In that case, as here, the issue that had not been raised before the lower courts was fully briefed before the state supreme court on its merits. 16 N.J. at 270. The court concluded that, "in accord with the philosophy of our present procedural framework to avoid unnecessary expense and waste of time consistent with the furtherance of the fair administration of justice, we ought not hestitate to adjudge the question if the matter is ripe for our determination." 16 N.J. at 270.[5]

Had this pronouncement of the "not raised below" rule been applied by the New Jersey Supreme Court in the instant case, it is difficult to conclude that the constitutional due process issue would not have been considered. In avoiding the constitutional issue, the court intimated that the issue might be resolved in some subsequent proceedings "before an appropriate tribunal. . . ." 97 N.J. at 302. To require Airwork to bring this issue before a different tribunal when the issue had been fully briefed before the New Jersey Supreme Court hardly "avoid[s] unnecessary expense and waste of time. . . ." Moreo-

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5. New Jersey Court Rule 1:1-2 provides:

The [court] rules. . .shall be construed to secure a just determination, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay. Unless otherwise stated, any rule may be relaxed or dispensed with by the court in which the action is pending if adherence to it would result in an injustice. In the absence of rule, the court may proceed in any manner compatible with these purposes.

ver, it is difficult to image to what tribunal the court was referring, as 28 U.S.C. §1341 would appear to prevent Airwork from pursuing its constitutional claims in a federal forum, other than through the writ which it now seeks.

Numerous other cases have included in the "not raised below" rule additional factors which, had the court considered them, would have been found to have been satisfied here. *See Planned Parenthood of New York City v. State,* 75 N.J. 49, 55, 379 A. 2d 841 (1977); *Berkowitz v. Berkowitz,* 55 N.J. 564, 569, 264 A.2d 49 (1970); *Farley v. $168,400.97,* 55 N.J. 31, 46, 259 A.2d 201 (1969); *Meeker v. Meeker,* 52 N.J. 59, 243 A.2d 801 (1968); *Hayden v. Curley,* 34 N.J. 420, 428, 169 A.2d 809 (1961); *Oliver v. Russo,* 29 N.J. 418, 420, 149 A. 2d 213 (1959); *Devlin v. Surgent,* 18 N.J. 148, 113 A.2d 9 (1955). In several of these cases, the court noted that the issue had not been fully briefed. By contrast, in the instant case, the due process issue was raised by the ACLU of New Jersey in support of Airwork's petition to the New Jersey Supreme Court, and, when the ACLU of New Jersey filed an *amicus curiae* brief, the Division of Taxation responded on the merits of the issue.

In several of its variations, the "not raised below" rule provides for an exception where a question first raised before the appellate court involves public policy concerns that impact beyond the specific interests of the parties. *See, e.g., A. & B. Auto Stores of Jones St., Inc. v. Newark,* 59 N.J. 5, 20, 279 A.2d 693 (1971) (a nonconstitutional claim, not raised below, was of sufficient public interest to justify the court addressing the issue); *American National Red Cross v. Lester,* 129 N.J. Eq. 28, 30, 18 A.2d 295 (E&A 1940). The New Jersey Supreme Court's refusal to apply this exception is inconsistent with the fact that the court granted the ACLU of New Jersey leave to appear as an *amicus curiae* and to address the due process question. The New Jersey court rules specifically provide that, in granting leave to appear as *amicus curiae* the court be satis-

fied that "the applicant's participation will assist in the resolution of an issue of *public importance* . . . ." New Jersey Court Rules 1:13-9 (emphasis supplied). Having invited the ACLU of New Jersey to participate in the resolution of an issue of public importance, it was disingenuous for the court to have refused to invoke its own "issue of public importance" exception to the "not raised below" rule.[6]

For these reasons, this Court should decide that the "not raised below" rule relied on by the New Jersey Supreme Court does not provide an adequate state ground for its decision not to address the substantive due process issue. Accordingly, this Court should conclude that it has jurisdiction.

A conclusion that this Court has jurisdiction will not offend the concerns that have prompted the Court to adopt the "not pressed or passed upon" rule. *See Illinois v. Gates,* 103 S.Ct. 2317, 2323-2324, ____ U.S. ____ (1983); *Webb, supra,* 451 U.S. 493. Because the constitutional issue was thoroughly briefed below, "the state court[] [has been] afforded the opportunity to perform [its] duty, which includes responding to attacks on state authority based on the federal law. . . ." *Webb,* 451 U.S. at 499.

With respect to the concern that "the parties [have] the opportunity to develop the record necessary for adjudicating the issue," *Webb,* 451 U.S. at 500, the record below permitted the New Jersey Supreme Court to dispose of the estoppel issue, which involved essentially the same factual questions as does the substantive due process issue. Despite the majority's

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6. The court's characterization of the issue as not having been raised below is suspect. 97 N.J. at 302. The Court's granting to the ACLU of New Jersey leave to appear on the due process issue was based on a necessary conclusion that this issue already was part of the litigation. In New Jersey, an *amicus* is not a party to an action but merely seeks to advise and assist the court on an issue already part of the litigation. *See Bethlehem Bd. of Education v. Bethlehem Education Association,* 177 N.J. Super. 479, 490, 427 A.2d 80 (App. Div. 1981).

professed concern regarding a "sound and complete record," 97 N.J. at 302, Justice Garibaldi's dissenting opinion persuasively established the sufficiency of the record to deal with the substantive due process issue. In particular, Justice Garibaldi found the record sufficient to establish the following:

> In reliance on the Release, Airwork, which is principally engaged in the business of repairing aircraft engines, did not collect sales tax from its out-of-state customers. It did collect sales tax from its New Jersey customers. From Airwork's point of view, a 1967 tax audit confirmed the viability of this position. During its 1967 audit of Airwork, the Division concluded that Airwork's policy of not collecting sales tax from its out-of-state customers was correct.
> [97 N.J. at 305 (Garibaldi, J., dissenting)]

As the substantive due process issue does not involve a disputed construction of the sales tax statute, this Court's concern that a state court be provided with the opportunity to construe its statutes so as to avoid or obviate Federal constitutional challenges has no application. *Webb,* 451 U.S. at 500. The only issue of construction relevant to the substantive due process issue was uncontroverted — *viz.*, that the New Jersey sales tax is a tax on purchases, not on the right of the vendor to do business; accordingly, the vendor is, in the first instance, a tax collector, not a taxpayer.

In the instant case, the only "independent and adequate state grounds that would pretermit the federal issues" which the state court could have "identified and acted upon in an authoritative manner," *Webb,* 451 U.S. at 500, is the alleged "not raised below" procedural defect. For the reasons already discussed, this Court should conclude that this purported procedural defect is inadequate to deny this Court jurisdiction.

Finally, the decision below is set forth in an opinion which prompted a vigorous dissent. Together, these two opinions permit this Court to evaluate the importance of giving plenary consideration to this case. *Webb,* 451 U.S. at 500-501.

For the reasons set forth above, this Court should conclude that the New Jersey Supreme Court's refusal to address the federal constitutional substantive due process issue does not provide an adequate basis for barring this Court's jurisdiction.

CONCLUSION

The application of the New Jersey sales tax to repair work performed by Airwork on out-of-state engines prior to the state's announced change in its position regarding the taxability of such work is fundamentally unfair. A state, whether acting through its legislature or through an administrative agency, must adhere to principles of fundamental fairness if government is to retain its legitimacy. To permit the New Jersey Supreme Court's decision to stand will erode the due process rights of all citizens.

The ACLU of New Jersey respectfully requests this Court to issue a writ of certiorari to review the judgment of the Supreme Court of New Jersey.

Respectfully submitted,

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